

Chinthapalli (Migration) [2023] AATA 920 (5 April 2023)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Shanmukhasairam Chinthapalli
REPRESENTATIVE:	Mr Ravinder Singh (MARN: 0956658)
CASE NUMBER:	2012384
HOME AFFAIRS REFERENCE(S):	BCC2018/2450939
MEMBER:	Stephen Witts
DATE:	5 April 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Skilled Regional Sponsored (Provisional) visa.

Statement made on 05 April 2023 at 4:17pm

CATCHWORDS

MIGRATION – Skilled Regional Sponsored (Provisional) (Class GK) visa – Subclass 489 Skilled - Regional (Provisional) – occupation of Engineering Technologist – incorrect information in the visa application – employment details – verification checks – points not claimed for work experience – compassionate or compelling circumstances – decision under review affirmed

LEGISLATION

*Migration Act 1958, ss 5(1), 65
Migration Regulations 1994, Schedule 2, cl 489.211; Schedule 4, Public Interest Criterion 4020; r 1.03*

CASES

*Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 23 July 2020 to refuse to grant the applicant a Skilled Regional Sponsored (Provisional) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicant applied for the visa on 7 June 2018. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 489.211 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate was not satisfied that the applicant met the requirements of Public Interest Criterion 4020.
5. The applicant appeared before the Tribunal on 5 April 2022 to give evidence and present arguments.
6. The applicant was represented in relation to the review.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 489.211 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
9. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

10. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
11. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
13. The Tribunal has considered all the material before it including evidence provided prior to the hearing and evidence given at the hearing.
14. The Tribunal notes that it has been provided with a copy of the relevant delegate's decision by the applicant. In that decision it was asserted by the delegate that the applicant did not meet the requirements of PIC 4020 in that the applicant provided a bogus document or false and misleading information in a material particular relevant to the application for the visa.
15. According to the delegate the applicant lodged a Skilled Regional Sponsored subclass 489 Skilled Regional Sponsored visa application on 7 June 2018 citing the nominated occupation of engineering technologist code 233914 claiming that he had overseas employment as an embedded engineer in the country of India from 10 January 2011 to 23 January 2013 with Arunodaya Electro Power Technologies; and as a design engineer also in India from 13 April 2015 until 30 November 2016 with Starlit Technologies.
16. According to the delegate it undertook checks to verify these claims and several concerns were raised. Regarding Arunodaya Electro Power Technologies, the employer confirmed that the applicant worked as a mechanical construction worker and solar project worker for 20 months but that he was not a permanent employee and would '*come and go*' working on the occasional project and that he left the organisation on many occasions. It was stated that the applicant's salary was paid in cash and the company maintained no records.
17. According to the delegate the applicant confirmed that he worked with this company between 2011 and 2013 and that he first visited the company as part of a project he was doing while studying and that he was offered a position as an intern. He said that he was a full-time employee, and the company has since been moved to another location and he was not sure whether it still existed.
18. According to the delegate it also conducted verification checks with Starlit Technologies and that several concerns were discovered in regard to this particularly that a web search determined that it was a software company that had a webpage for less than five months created on 9 August 2017 which was unusual for a software company claiming to have been

established for at least three years as per the date of the reference letter. It was also noted by the delegate that a search of the company address revealed that several software companies shared the same address. It was further asserted that phone call checks were made to another company with the same address as the applicant's stated employer and received an unhelpful response from the individual who signed the applicant's reference letter which seemed to indicate that this company did not necessarily exist as a real company and that they may have only existed to provide a reference letter in exchange for money.

19. According to the delegate it contacted the applicant providing him with an opportunity to respond to the information outlined above noting that a letter and email was received from the applicant's migration agent included a statutory declaration from the applicant providing no independent third-party verifiable evidence of his overseas employment and no evidence that resolves the concerns raised in the department's correspondence as noted above.
20. According to the delegate it asserted that the applicant's response had not adequately addressed the concerns raised regarding the applicant's employment status at Arunodaya, and his salary paid, and also the concerns outlined above regarding Starlit Technologies.
21. According to delegate it also noted in the assessment as to whether to waive the requirements of PIC 4020 specifically as to whether there were any compelling circumstances affecting the interest of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that justify the grant of the visa, and made a finding that no such evidence existed.

22. **Applicant's submissions**

23. The Tribunal notes that it has been provided with submissions from the applicant's representative prior to the hearing dated 27 March 2023.
24. In this submission it stated that the applicant was refused a visa because it was asserted by the Department that he provided information that was false and misleading regarding his work experience. It was stated that it is important to note that the applicant has not claimed any points for work experience and that the claimed experience was not used in the skills assessment for the nominated occupation and that this means that the claimed experience does not have any material effect on the visa application.
25. It was also stated that there was no deliberate attempt to mislead or deceive the Department as *"it is possible that the applicant may have provided information in good faith believing that it was relevant to the visa application or to provide a more common complete picture of their employment history"*.
26. It was also stated that the applicant's lack of intention to claim points for work experience or use the claimed experience for the skills assessment demonstrates that there was no deliberate attempt to mislead the department and that it is possible that the applicant may have provided information because he considered that it was relevant to his visa application and to provide more information about his employment history.
27. It was further asserted in this submission that *"the mere fact that an applicant has provided false information about their work experience does not automatically mean that they have breached PIC 4020, especially if the false information is not material to the visa application"*.
28. It was further stated that false and misleading information regarding the work experience should not be considered a material factor and that it is reasonable to argue that this claimed

work experience should not be considered a material factor; and that *“the impugned information provided by the applicant, although false and misleading, is not relevant to any of the criteria that the Minister may consider when making a decision on the subclass 489 visa application”*.

29. In summary it was stated that the applicant did not breach PIC 4020 and that his genuine intention to migrate to Australia should be taken into consideration and that *“the mere fact that an applicant has provided false information about their work experience does not automatically mean they have breached PIC 4020, especially if the false information is not material to the visa application.”*

30. **Hearing submissions**

31. The applicant stated that first came to Australia in 2016 on, he said, an 18-month temporary visa and that he came to Australia immediately from the UK where he had studied at master's level in electronics specialising in solar technology, and that before that he studied at bachelor level in engineering back in his home country of India. He stated that he did search for jobs when he first arrived but found it difficult to find employment initially. He stated that he finished his study in 2017 and that he then worked for Calex Pty Ltd in his field for 11 months before losing his job and that he then worked regionally in Ararat for AMES Systems Pty Ltd in 2018.
32. He stated that his family members back in India were affected by the pandemic and that he returned to India in 2020 and that he has not been able to return to Australia since then. He stated that he is working casually back in his home country and is assisting his uncle working in a family business in the Temple. He stated that he has a wife, and that he married in 2019, and that he hoped she would be a dependent on a visa application to Australia.
33. He also stated that he can demonstrate that he has the necessary 65 points for permanent residency regardless of any overseas work experience and that therefore he is very disappointed that he is unable to proceed with a migration outcome in Australia at this time.
34. The Tribunal had a detailed discussion with the applicant regarding the assertions made by the Department regarding his employment with the two cited companies. He stated that all the documents that he provided to the Department were genuine and that the first company he worked for, Arunodaya, ceased to exist in 2014, but that it offered him a permanent position after his internship but that due to family circumstances he could not proceed with the offer, but did not provide any specific evidence in regard to the contentions made by the Department except that he reiterated that he did actually work there for them. Regarding the second company, Starlit, he stated that the company still exists, that is it is a family-owned small consulting business, but also did not provide any specific and relevant evidence refuting the contentions made by the Department in regard to the checks made to verify his employment.
35. The Tribunal has considered the arguments put in regard to the applicant's claim that he undertook work experience with the two above companies and that that experience was genuine work experience, and finds that, after careful consideration, the applicant has not provided any verifiable evidence to refute the contentions by the delegate regarding the applicant's work experience with the two companies and specifically that the applicant was not necessarily a permanent or full-time employee, and the Tribunal finds that he worked probably as a contractor or perhaps a casual employee on occasional projects with those two companies. The Tribunal finds that the applicant has not provided any evidence to validate his employment with those two companies, or the nature of that employment.

36. The Tribunal has considered the evidence put by the applicant very carefully, that it has been stated by the applicant's representative that it is acknowledged that the applicant may have provided misleading information but that it may have been unintentional and that it may in any case not be a material factor.
37. In regard to the argument asserted that the information may have been provided unintentionally the Tribunal finds that on the balance of probability that the applicant would have provided this information intentionally in an attempt to demonstrate that he has the skills necessary to be eligible for the visa that he applied for and that the information that he provided regarding his claimed work experience was provided intentionally to facilitate the department providing him with this visa.
38. The Tribunal has also considered very carefully the argument put by the applicant and the applicant's representative that the applicant has not claimed any points for work experience and that this claimed experience was not used in the skills assessment for the nominated occupation of engineering technologist therefore claiming that the misleading information that may have been provided has no material effect on the visa application.
39. The Tribunal finds that this is not a valid argument that mitigates any factual finding that the applicant did provide misleading information to the Department. As stated, the Tribunal has considered this matter carefully and finds that the information that the applicant provided to the Department is very relevant to any assessment as to whether the applicant provided misleading information relevant to the application for the visa irrespective of the above justification that the provision of such information is not material.
40. The Tribunal finds that it is material. As the Tribunal finds that the applicant did provide misleading information to the Department, the Tribunal also finds that the fact that the applicant may not have used this claimed experience in skills assessment does not mitigate the essential finding.
41. The Tribunal has also considered the assertions made that it should be considered that the applicant has a genuine intention to seek to migrate to Australia. The Tribunal finds that this is not relevant to an assessment as to whether the applicant has provided misleading information in accordance with PIC 4020.
42. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

43. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
44. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
45. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.

46. The Tribunal had a discussion with the applicant as to whether there were any compelling circumstances that affect the interest of Australia, or whether there were any compassionate or compelling circumstances that affect the interest of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen that justify the grant of the visa.
47. The applicant stated that '*no*' he did not have any evidence to provide in regard to this and that there were no compelling or compassionate circumstances to consider.
48. Therefore the requirements of PIC 4020(1) and (2) should not be waived.
49. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 489.211.
50. The Tribunal also notes that there was no evidence before it in regard to the applicant meeting the criteria for any other subclass within the class of visa sought.

DECISION

51. The Tribunal affirms the decision not to grant the applicant a Skilled Regional Sponsored (Provisional) visa.

Stephen Witts
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...